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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/502,021

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EXAMINER

SASAN, ARADHANA

ART UNIT

PAPER NUMBER

1615

MAIL DATE

DELIVERY MODE

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/502,021	Applicant(s) EVANS ET AL.	
	Examiner ARADHANA SASAN	Art Unit 1615	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 20 July 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-15 and 17-21 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-15 and 17-21 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 20 July 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>11/8/04, 12/6/04 and 11/18/05</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Status of Application

1. Claims 1-15 and 17-21 are included in the prosecution.

Priority

2. Acknowledgment is made of applicant's claim for foreign priority under 35 U.S.C. 119(a)-(d).

Information Disclosure Statement

3. The information disclosure statements (IDS) submitted on 11/8/04, 12/6/04 and 11/18/05 are acknowledged. The submissions are in compliance with the provisions of 37 CFR 1.97 and 1.98. Accordingly, the examiner is considering the information disclosure statements.

See attached copy of PTO-1449.

Claim Rejections - 35 USC § 101

4. 35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

5. Claim 17 is rejected under 35 U.S.C. 101 because the claimed recitation of a use, without setting forth any steps involved in the process, results in an improper definition of a process, i.e., results in a claim which is not a proper process claim under 35 U.S.C. 101. See for example *Ex parte Dunki*, 153 USPQ 678 (Bd.App. 1967) and *Clinical Products, Ltd. v. Brenner*, 255 F. Supp. 131, 149 USPQ 475 (D.D.C. 1966).

Claim Rejections - 35 USC § 112

6. The following is a quotation of the second paragraph of 35 U.S.C. 112:

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The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

7. Claim 17 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 17 provides for the use of gelled particles, but, since the claim does not set forth any steps involved in the method/process, it is unclear what method/process applicant is intending to encompass. A claim is indefinite where it merely recites a use without any active, positive steps delimiting how this use is actually practiced.

Claim Rejections - 35 USC § 103

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

9. Claims 1-15 and 17-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Frith et al. (EP 1 285 588 A1) in view of Brown et al. (US 6,673,371).

The claimed invention is a cosmetic or personal care composition comprising: gelled particles, wherein the gelled particles comprise water and at least 50% by volume of the particles have an aspect ratio of at least 5 and a maximum width of 40 μ m; and at least one cosmetically acceptable material selected from surfactants, hair conditioning agents, perfume or fragrances and hair styling polymers.

Frith teaches a composition that is a “dispersion comprising two aqueous phases. The first phase is a phase of gelled particles” (Col. 3, lines 15-17). “The gelled particles of the first phase are characterised by a specific aspect ratio in combination with a specific width ... a minimum of 50 vol% of the particles have an aspect ratio of at least 5, and a maximum width of 40 μm and a minimum of 20 vol% of the particles have an aspect ratio of at least 10, and a maximum width of 20 μm ” (Col. 3, lines 19-27). “At least 5 vol% of the particles are characterised by an aspect ratio of at least 50, and a maximum width of 20 μm ... the particles are characterized by a minimum width of 0.5 μm ... 1 μm ” (Col. 3, lines 33-37). κ -carrageenan is disclosed as a gelling biopolymer (Col. 3, lines 44-47). The composition can be applied in any type of water continuous product (Col. 5, lines 36-37). The reference discloses a process for the preparation of a composition comprising the gelled particles. The process comprises: “a) mixing two aqueous phases each comprising a polymer, ... wherein at least one of the polymers is a gelling biopolymer, b) treating the mixture according to (a) such that one of the phase is present in the form of droplets in the second phase, c) subjecting the mixture to shear flow, d) subjecting the mixture to a gelation treatment during or after step (c)” (Col. 6, lines 35-48).

Frith does not expressly teach a cosmetic or personal care composition comprising gelled particles.

Brown teaches “compositions comprising a phase formed from a particular type of gel which may be used, for example, as hair treatment compositions and personal wash compositions” (Col. 1, lines 7-11). The compositions are “shear-thinning, which

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can be a useful property in hair treatment compositions such as shampoos and conditioners, because the user can perceive the product as thick and viscous, and yet find it easy to apply” (Col. 5, lines 1-4). Gel particles are formed and surfactants or other ingredients are added (Col. 6, lines 63-66). Carrageenan is disclosed (along with κ -carrageenan) as a polymer used for the gel particles (Col. 9, lines 52-54 and Col. 10, lines 14-15). Hair treatment compositions with a hair benefit agent suspended (such as a conditioning agent) in another phase are disclosed (Col. 12, line 37-52). Shampoo compositions, conditioners, hair styling gels with hair care adjuvants are disclosed (Col. 36 to Col. 20, line 44).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to make a composition comprising gelled particles where a minimum of 50 vol% of the particles have an aspect ratio of at least 5, and a maximum width of 40 μm , as taught by Frith, combine it with the hair treatment compositions comprising gel particles and surfactants, as suggested by Brown, and produce the instant invention.

One of ordinary skill in the art would have been motivated to do this because Brown teaches the use of the gel particles in compositions with surfactants and further teaches that “gel particles which have already been formed remain stable if surfactant is added subsequently” (Col. 6, lines 19-23). Therefore, one with ordinary skill in the art would combine the gelled particles of Frith with the compositions for hair treatment comprising gel particles as suggested by Brown, with have a reasonable expectation of success.

From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the invention as a whole was *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in the absence of evidence to the contrary.

Regarding instant claim 1, the cosmetic or personal care composition would have been obvious over the hair treatment compositions taught by Brown (Col. 36 to Col. 20, line 44). The limitation of the gelled particles would have been obvious over the gelled particles with a minimum of 50 vol% of the particles having an aspect ratio of at least 5, and a maximum width of 40 μm , as taught by Frith (Col. 3, lines 19-27). The limitation of at least one cosmetically acceptable material would have been obvious over the surfactants, conditioners, and hair styling gels with hair care adjuvants disclosed by Brown (Col. 6, lines 63-66, Col. 36 to Col. 20, line 44).

Regarding instant claim 2, the limitation of at least 20% by volume of the particles having an aspect ratio of at least 10 and a maximum width of 20 μm would have been obvious over the minimum of 20 vol% of the particles that have an aspect ratio of at least 10, and a maximum width of 20 μm , as taught by Frith (Col. 3, lines 19-27)

Regarding instant claim 3, the limitation of at least 5% by volume of the particles having an aspect ratio of at least 50 and a maximum width of 2 μm would have been obvious over the 5 vol% of the particles with an aspect ratio of at least 50, and particles that are characterized by a minimum width of 0.5 μm to 1 μm , as taught by Frith (Col. 3, lines 33-37). One with ordinary skill in the art would manipulate the parameters of

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producing the gelled particles given the teaching of Frith, and would arrive at the maximum width of $2\mu\text{m}$ during the process of routine experimentation.

Regarding instant claim 4, the limitation of greater than 90% of the particles with a minimum width of $0.5\mu\text{m}$ would have been obvious over the minimum particle width of $0.5\mu\text{m}$ to $1\mu\text{m}$, as taught by Frith (Col. 3, lines 35-37).

Regarding instant claims 5-7, the limitation of the gelled particles comprising a gelling polymer would have been obvious over the κ -carrageenan is disclosed as a gelling biopolymer as taught by Frith (Col. 3, lines 44-47) and by the carrageenan and κ -carrageenan used for the gel particles by Brown (Col. 9, lines 52-54 and Col. 10, lines 14-15).

Regarding instant claim 8, the limitation of the gelled particles that are present in the composition in an amount of from 0.1% to 60% by volume of the composition would have been obvious over the gelled particle composition that is used at a maximum of 30 wt% in a final product, as taught by Frith (Col. 5, lines 43-45). One with ordinary skill in the art would be able to vary the amount of gelled particles in the final product as this is a manipulatable parameter, in order to optimize the texture, viscosity, stability and efficacy of the finished product.

Regarding instant claims 9-14, the limitation of the hair treatment composition would have been obvious over the hair treatment compositions including shampoo compositions, conditioners, hair styling gels with hair care adjuvants, as taught by Brown (Col. 12, line 37-52, Col. 36 to Col. 20, line 44).

Regarding instant claim 15, the method of treating hair would have been obvious over the gelled particles with a minimum of 50 vol% of the particles having an aspect ratio of at least 5, and a maximum width of 40 μm , as taught by Frith (Col. 3, lines 19-27) in view of the method of treating hair with a composition comprising a multiplicity of separate gel particles, as taught by Brown (Col. 26, claim 13, lines 11-18).

Regarding instant claim 17, the use of gelled particles for providing textural properties to a cosmetic or personal care composition would have been obvious over the gelled particles in hair treatment compositions, as taught by Brown. Brown also teaches that the “compositions ... may be made with viscosities in a wide range. At one extreme, the compositions may be freely mobile, self-levelling and pourable, although thicker than water. On the other hand, they may be made as viscous liquids which can be squeezed from a collapsible container, and yet which are too viscous to pour, except very slowly” (Col. 4, lines 61-67).

Regarding instant claims 18-21, the process for producing a cosmetic or personal care composition comprising forming the gelled particles would have been obvious over the process of preparing the gelled particles as taught by Frith (Col. 6, lines 35-48) in view of the process for producing the composition comprising gel particles and hair benefit agents as taught by Brown (Col. 25, claim 9).

Double Patenting

10. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct

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from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

11. Claims 1, 3, 5-7 and 19 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-4, 6 and 12 of U.S. Patent No. 7,169,427 ('427 hereinafter). Although the conflicting claims are not identical, they are not patentably distinct from each other because the difference is that instant claims are drawn to a cosmetic or personal care composition. It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the composition recited in claims of '427 as a cosmetic or skin care composition because this is an intended use of the composition and structurally the composition is the same as the composition in '427.

Therefore instant claims are obvious over the claims of '427 and they are not patentably distinct over each other.

Conclusion

12. No claims are allowed.

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13. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Aradhana Sasan whose telephone number is (571) 272-9022. The examiner can normally be reached Monday to Thursday from 6:30 am to 5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Woodward, can be reached at 571-272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Aradhana Sasan/
Examiner, Art Unit 1615

/Michael P Woodward/
Supervisory Patent Examiner, Art Unit
1615